

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**MICHIGAN BELL TELEPHONE COMPANY,
AND AT&T SERVICES, INC., JOINT EMPLOYERS**

Respondents

and

Case 07-CA-182505

**LOCAL 4034, COMMUNICATIONS WORKERS
OF AMERICA (CWA), AFL-CIO**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT EMPLOYERS' EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

/s/ Robert A. Drzyzga
Robert A. Drzyzga
Counsel for the General Counsel
National Labor Relations Board
Region Seven
Patrick V. McNamara Building
477 Michigan Avenue—Room 300
Detroit, Michigan 48226-2569
(313) 335-8052
Robert.Drzyzga@nrlrb.gov

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
I. Procedural History.....	1
II. General Counsel’s Position on Respondents’ Exceptions.....	1
III. Conclusion.....	3

TABLE OF AUTHORITIES

Cases

The Boeing Company, 365 NLRB No. 154, slip op at p 3-4, (December 14, 2017)...2-4

Whole Foods Market, Inc., 363 NLRB No. 87, slip op at 2 (December 24, 2015).....3

NLRB Rules and Regulations

§102.6 Notice to the Administrative Law Judge or Board of supplemental authority.....1

§102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.....1

Now comes Robert A. Drzyzga, Counsel for the General Counsel in the above-referenced matter, and pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, who respectfully submits the following Answering Brief:

I. Procedural History

On September 27, 2017, Administrative Law Judge (ALJ) Charles J. Muhl issued his decision in the above matter, finding Respondents violated Section 8(a)(1) of the Act by maintaining two overly broad rules and by suspending and then discharging discriminatee Scott Stewart under one of the rules found unlawful. Pursuant to his findings, ALJ Muhl transferred proceedings to the Board.

On December 20, 2017, Counsel for the General Counsel submitted a Motion to Remand in Part to resolve the suspension and discharge allegations pursuant to a non-Board settlement reached by the parties. On January 18, 2018, Counsel for the General Counsel submitted a Motion to Remand the case in its entirety in order to withdraw all complaint allegations and resolve the case. On February 15, 2018, all parties filed a Joint Motion to Vacate Decision of the ALJ and Remand Proceedings to Region 7. On February 21, 2018, Counsel for the General Counsel filed a Motion to Remand Proceedings to Region 7 Under Rules and Regulations 102.6.¹

II. General Counsel's Position on Respondents' Exceptions

Section 102.6 of the Board's Rules and Regulations, states, in part:

“Pertinent and significant authorities that come to a party's attention after the party's submission to the Administrative Law Judge or the Board has been filed may be brought

¹ The Board has yet to rule on any of the motions.

to the Judge's or the Board's attention by the party promptly filing a letter with the judge or the Board and simultaneously serving all other parties."

In *The Boeing Company*, 365 NLRB No. 154, slip op at p 3-4, (December 14, 2017), the Board articulated what it identified as a new standard in determining whether an employer rule is unlawful: "[W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights *and* (emphasis in original) (ii) legitimate justifications associated with the rule." The Board noted that as a result of the balancing test, it will delineate three categories of employment policies, rules and handbook provisions. The Board noted that the categorization of such rules represent an application of the new balancing test, but are not part of the test itself

Counsel for the General Counsel believes that both of the rules fall into Category 1 under the Board's new test in *Boeing*, and that if the Board concludes that either of these rules falls into Category 2, the Board should nevertheless remand the case to the Region since the Charging Party does not wish to proceed with litigation in this matter and will withdraw the rule allegations, thereby resolving the case in its entirety through the withdrawal of all the complaint allegations.

Should the Board determine that the rules are not Category 1 rules but instead Category 2 rules, Counsel for the General Counsel requests that the Board remand proceedings to ALJ Muhl to take further evidence on the rules to determine their impact on Section 7 rights.

Privacy of Communication Rule

The Privacy of Communications rule (the no-recording rule) is essentially the same as the no-camera rule at issue in ***Boeing***, where employers have a strong business interest that outweighs employees' tangential Section 7 right to record working conditions, similar to the one discussed in then Board member Miscamarra's dissent in ***Whole Foods Market, Inc.***, 363 NLRB No. 87, slip op at 2 (December 24, 2015), i.e., that having a rule prohibiting recording encourages open communications and free expression.

Not For General Distribution Rule

The second rule, which appears at the bottom of certain disciplinary forms, provides that the form can only be "used" by authorized individuals and is "not for general distribution". Counsel for the General Counsel believes that this would not significantly impact Section 7 activities and that the Respondent has a general business interest in not allowing disciplinary notices to be casually distributed.

If it is determined necessary by the Board, Counsel for the General Counsel does not oppose Respondents' Motion to consolidate this case with ***AT&T Mobility, LLC***, JD 27-17, April 25, 2017, Case 05-CA-178637.

III. Conclusion

WHEREFORE, Counsel for the General Counsel respectfully requests that the Board issue an order remanding this case in its entirety to the Region, so that the Regional Director can take appropriate action regarding the Charging Party's requests to

withdraw all the Complaint allegations by issuing an Order withdrawing all the Complaint allegations pursuant to the non-Board settlement agreement on the suspension and discharge allegations, and withdrawing the remaining Complaint allegations on the alleged unlawful rules in light of the **Boeing** decision, thereby closing the case in its entirety.

Respectfully submitted at Detroit, Michigan, this 8th day of June, 2018.

/s/ Robert A. Drzyzga.
Robert A. Drzyzga
Counsel for the General Counsel
National Labor Relations Board
Region Seven
Patrick V. McNamara Building
477 Michigan Avenue—Room 300
Detroit, Michigan 48226-2569
(313) 335-8052
Robert.Drzyzga@nrlrb.gov

CERTIFICATE OF SERVICE

I certify that on the 8th day of June 2018, I e-filed **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT EMPLOYERS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**, and served a copy electronically on the following parties of record:

Via E-Mail:

Stephen J. Sferra, Esq.
Littler Mendelson, PC
1100 Superior Ave, 20th Floor
Cleveland, OH 44114-2518
Email: ssferra@littler.com

Ted Brash, Area Manager
Michigan Bell Telephone Company, AT & T Services, Inc., Joint Employers
1391 Grand Oaks Dr.
Howell, MI 48843
Email: tb1473@att.com

Ryan Letts, President
Brian Hooker, Administrative Assistant
Local 4034, Communications Workers of America (CWA), AFL-CIO
3281 Kentland Ct. SE
Wyoming, MI 49508
Email: hooker@cwa4034.org
ryanletts@cwa4034.org

/s/Robert A. Drzyzga
Robert A. Drzyzga
Counsel for the General Counsel
National Labor Relations Board- Region 7
Patrick V. McNamara Federal Bldg.
477 Michigan Avenue, Room 300
Detroit, MI 48226
(313) 335-8052
robert.drzyzga@nrlrb.gov